



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. E001 OF 2021

ABDULAHI MAALIM.....1ST PLAINTIFF/APPLICANT

NOOR MAALIM.....2ND PLAINTIFF/APPLICANT

(Suing for and on behalf of 57 members of Siqle Self Help Group)

VERSUS

WASO RESOURCE DEVELOPMENT AGENCY (WARDA).....1ST DEFENDANT/RESPONDENT

BLUE MAGIC LTD.....2ND DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to the Notice of motion filed on 17th August 2021 by the plaintiff's/Applicants seeking the following Orders';

a. Spent

b. Spent

c. That an injunction do issue restraining the Defendants/Respondents whether by themselves, their servants, hirelings or their agents or others claiming through or under them from invading, entering upon, occupying, alienating, transferring, leasing, mortgaging or in any way interfering with the land allotted to the plaintiffs/ Applicants or in any way whatsoever from interfering with the Plaintiff's/Applicants property rights accruing on the said parcel of land pending the hearing and determination of this suit.

d. The OCPD Habaswein Sub County be directed to enforce the Court Orders of this Honorable Court and provide necessary security to avert invasion and/or trespass on the suit property.

e. That the costs of the application be borne on the cause.

2. The application is supported by affidavit of **Abdullahi Maalim, the chairman of the Siqle Self Help Group**. He averred that at all material times to this suit, they have been owners of Plot No. HAB/KBL/594 L.R. No. 29714 located in Habaswein Sub County allocated to them by the Ministry of Lands vide allotment letter dated 3/12/1999.

3. That they have since paid the requisite fees to satisfy the terms and conditions for allocation and they now hold the Original Deed Plan issued by Survey of Kenya. He equally averred that they have been peacefully occupying the suit premises since 2010. That on or about 21st July 2021, the Defendants and other unknown people trespassed and erected temporary structures on the property. That they are apprehensive that the Defendants acts of erecting permanent structures is with the intention of dispossessing them. That efforts to peacefully remove the trespassers have borne no fruits.

4. The 1st Respondent filed her Replying Affidavit on 3/11/2021 sworn by one of their directors namely **Abdiaziz Dubat**. He averred that in the year 2018, the executive office of the President Department of Arid and Semi-Arid regions advertised for bid for FRP No. KE-DASAR-14313-QCBS-RFB for hire of consultancy services for Non-Profit making Organization (NGO) for Wajir South Sub County. That the government of Kenya had secured financing from the World Bank towards the costs of Kenya Development Response to displacement impacts project (KDEDIP) under the Department of Arid and Semi-Arid Regions (DASAR) and part of the funds thereof were applied in securing for consulting service for facilitation partners (FP).

5. That the project was to be implemented on a parcel of land provided by the target community. That the 1st Respondent was a facilitator and implementer of the project and did not in any way claim title to the property.

6. That on a without prejudice basis, the plaintiff has not attached an allotment letter, documents of ownership and evidence of payment of land rates. That it is only a four mile strip of land in Wajir town that one can obtain title, the rest is community land. The community donated the land for the building of the dispensary. That there is need to be obtained the original deep plan from the survey of Kenya and verify the survey land references with the department of lands and physical planning. That the land surveyor in Wajir can help the court generate the land references from the deed plan, verify the same on the ground and see whether the land in which the dispensary is being built fall in the area marked.

7. That the plaintiffs are claiming that the land belongs to Sigle Self-help group which was registered in 1983. The certificate of registration is not attached. Certificates of registration are renewed every year. A search in the department of social services records reveals that there is no group registered as Sigle Self Help Group in 1983. However, there is a Sigle Self Help Group registered on 2/5/2017 in which Gamana Haya Elmi and Sharif Othwa are the chairpersons and the secretary respectively. Gamana Haya is the wife of Abdullahi Maalim. This is the same group Abdullahi Noor is claiming to have existed since 1983. Sigle Self-help Group is a beneficiary of KDRDIP component 3 (livelihoods) and has benefited from KDRDIP grant of Kshs. 500,000/=.

8. That the 1st Defendants name be struck out of the proceedings herein as it has been improperly enjoined herein and more specifically paragraph 3 of the plaint be struck off.

9. The 2nd Defendant/ Respondent filed an application dated 25th October 2021 distancing itself from the suit. It averred that it had been wrongly sued as there is no reasonable cause against it and sought this court to strike it off the plaintiff's plaint/ suit dated 16th August 2021.

10. The plaintiff filed a Supplementary affidavit dated 9th November 2021 also sworn by **Abdullahi Maalim**. He averred that the plaintiff was not consulted concerning the project mentioned by the Defendant in Paragraph 11 & 12 of its reply. He denied that the land was donated to the 1st Defendants by the Community. He also denied the claim that only a four-mile strip of Wajir town can one obtain title.

11. He annexed a copy of the **allotment letter- AM1, copy of receipt-AM2, Minutes from the county Council dated 17th June 2009-AM3, Letter from the Office of the president acknowledging ownership by the plaintiff/applicant- AM4, correspondence with the county Council on allocation of the land- AM5, Letter from Ministry of lands approving survey- AM6, Certificate of Registration of the Self Help Group- AM7.**

12. On 26/10/2021, the Court directed the parties to canvass the application through written submissions. all the parties restated the averments made in their affidavits. They all agree that the Court of Appeal in East Africa in the celebrated case of **Giella versus Casman Brown (1973) EA 358** set the conditions precedent for the granting of an interlocutory injunction. The plaintiffs cited the case of **Joseph Wambua Mulusya vs David Kitu & Another** and urged the court that the balance of convenience tilts in their favour. They also cited the case of **Samaki Industries Kenya Ltd vs Bulhon Bank Ltd and Anor. Mombasa Hcca 485 of 1999** which stated that the true loss of land is not remediable.

13. The 1st defendant challenged the capacity of the plaintiff's in instituting this suit and submitted that they are not the registered officials of the self-help group. They also questioned the ownership of the suit premises by the self-help group and therefore submitted that they have not raised a prima facie case as observed in the case of **Mrao Limited versus First American Bank of Kenya and 2 Others (2003) KLR 215**. The 1st Defendant restated that he is only a consultant and has no interest in the land or title to it. That it engaged the community before conducting the consultancy services. That there is therefore no irreparable harm to be occasioned to the plaintiff. That the balance of convenience tilts toward permitting public interest to thrive against private interest given the wider good of the government project in the area. In this regard, he cited the case of **Nguruman Limited v Jane Blonde Nelsen and 2 Others [2014] eKLR, Pius Kipchirchir Kogo v Frank Kimeli Tena [2018] eKLR**.

14. The 2nd Defendant submissions inclined to the sole prayer that its addition to this suit was a misjoinder and that its name ought to be struck out. It lay credence in the case of **Skair Associates v Evangelic Lutheran Church of Kenya & 4 Others [2015] eKLR**.

ANALYSIS AND DETERMINATION

15. I have carefully considered the pleadings in general, annexure thereto, written submissions, the cited authorities and the relevant provisions of law. The application herein is anchored under **Order 40 Rule 1(a) of the Civil Procedure Rules** which provides: -

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

16. In **Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, the Court held that: -

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must

show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420."

17. On *Whether the plaintiff has raised a prima facie case*. The respondents herein have disputed the capacity of the plaintiff to these proceedings. In particular, they take issue with whether the plaintiff's self-help group was registered by the time they were allegedly allocated the suit premises. I have looked at the documents presented by the parties and find both raising weighty issues/ points of law to be considered by this court at a later stage of this proceedings.

18. The plaintiff's credence to acquisition of the suit premises is based on the minutes dated 17th June 2009. I have looked at the said minutes and find that the same was in relation to Farm R574. The plaintiff has not shown its correlation with the suit premises. I have also looked at the allocation of the plot form and the minutes cited. The form states that the same was issued under minute 3/2010 held on 26/6/2010. The minutes attached in relation to the suit premises are dated 17/6/2009. The receipt attached possibly for payment of allotment was made in the year 2020. The plaintiff's claim to have owned the land since 1999. The letters annexed seek support from various entities towards their acquisition of the suit premises.

19. I have evaluated and analyzed these documents and it clearly shows that there are a number of discrepancies/queries to be ascertained. I do find that the same can only be verified and properly authenticated during the full hearing of this suit. The plaintiff has therefore not raised a prima facie case.

On *whether the plaintiff will suffer irreparable loss*. The defendant has stated clearly that they seek to establish a dispensary which is for the betterment of the members of the community. That they do not have any intention of owning the title to the suit property. Having found that there are glaring inconsistencies in the plaintiff's averments and having found that Respondents interest in the suit land is for the public and not personal benefit, I find that the plaintiff has not proved that he will suffer irreparable loss. I have in mind that the dispensary may as well be for the benefit of the plaintiff who by any measure is a large group of persons possibly residing within the suit premises.

20. Even if I was to decide this case on a balance of convenience, I still find that the same tilts in favour of the Respondents. The plaintiff application in my view fails and the same is hereby dismissed with costs to the Respondents.

21. Before I conclude this ruling, I realize that the 2nd Respondent has raised issues in his response and submissions of being wrongly joined as a party and sought to be withdrawn from these proceedings. The 2nd defendant is advised to make a formal application and move the court appropriately for his removal as a party. Orders accordingly.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 17TH DAY DECEMBER, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Applicant/Advocate: absent

2. Respondent/Advocate: absent

3. Court Assistant: Ijabo